Supreme Court, U.S.
FILED

No.

In The

Supreme Court of the United States

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October Term, 1999

UNITED STATES BAKERY, INC., dba SNYDER'S BAKERY, INC., a foreign corporation,

Petitioner,

v.

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Washington (Division III)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

State wage-and-hour laws typically exempt "outside salesmen" from their coverage. A union decides in collective bargaining that certain jobs are exempt "outside salesmen," and bargains for them to be paid a weekly salary plus sales commissions. Some of the affected workers disagree, contending they don't meet the definition of "outside salesmen," and are dissatisfied at not receiving overtime pay. They nevertheless do not file a grievance or invoke arbitration as provided in the collective bargaining agreement. Instead, they sue the employer in state court for overtime pursuant to the state wage-and-hour statute, and demand an injunction against their collectively bargained compensation system.

The questions presented are:

1. Does the Labor Management Relations Act pre-empt their state law challenge to the collective bargaining agreement, at least where they have failed to resort first to the grievance and arbitration procedure?

2. Where the collective bargaining agreement is relevant evidence in determining whether the plaintiffs meet the statutory definition of exempt "outside salesmen," does the Labor Management Relations Act pre-empt the state court from interpreting the collective bargaining agreement and require resort to arbitration for that purpose instead?

3. If so, may the state court avoid federal pre-emption and arbitration by refusing to consider evidence of the collective bargaining agreement, where doing so would deprive the unionized employer of its best evidence and thereby cripple its defense?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE

Petitioner United States Bakery, Inc. is privately owned and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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United States Bakery, Inc., dba Snyder's Bakery, Inc., (U.S. Bakery) respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Washington.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition. It is reported at 95 Wash. App. 399, 976 P.2d 134 (1999).

JURISDICTION

The Washington Court of Appeals rendered its opinion on March 30, 1999. A timely petition for rehearing was denied on May 4, 1999. A timely petition for review to the Washington Supreme Court was denied on November 2, 1999. On that date the decision below became final (Appendix F). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Although the Washington Court of Appeals remanded the case to the trial court for further proceedings, its decision was nevertheless final for purposes of 28 U.S.C. § 1257. *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n 5. (1983).

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STATEMENT OF THE CASE

The 13 named plaintiffs are Teamsters who describe themselves as "route sales persons" or "driver-sales persons." (CP 46 ¶ 3.1; CP 56.) They drive bread trucks in Spokane and Yakima from which they sell bakery products to grocery stores and other customers. They work for defendant United States Bakery under collective bargaining agreements negotiated by the Teamsters.

These 13 plaintiffs are dissatisfied with one of the terms and conditions of employment that their bargaining agent negotiated for them. They are classified as "outside salesmen," and as a result they are not entitled to time-and-a-half pay for overtime hours. (CP 425-26 ¶ 17a.) "Outside salesmen" are exempt under the overtime laws of most states,[1] including Washington.

These 13 plaintiffs deny they are "outside salesmen," their collective bargaining agreements notwithstanding. Consequently they claim they have a statutory right to time-and-a-half pay for overtime hours. They brought this action in Washington state court for overtime pay, and for an injunction.

In bringing this action, plaintiffs introduced into state court a controversy that has occupied the collective bargaining process for more than 10 years. Whether these Teamsters route sales persons meet the definition of

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[1] Presumably because the Washington statute, like the statutes of other states, is derived from the equivalent federal provision of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1). Similarly, the Washington definition of "outside salesman" (App. J), like the definitions in other states, is patterned after the federal definition in 29 C.F.R. § 541.500.

"outside salesmen" has been addressed at length during each of the last four negotiations for the collective bargaining agreements. The Teamsters spent much time evaluating the nature of their duties and their compensation before concluding that they were indeed "outside salesmen." (*See, e.g.,* CP 417 ¶ 5; 422 ¶ 12; 424 ¶¶ 15-16.) The issue was the subject of a statewide meeting of Teamsters local representatives. (CP 418 ¶ 6-8.) The Teamsters also referred the issue to their national leadership, which concurred with the "outside salesmen" conclusion. (CP 418-19, ¶ 7.)

Most of plaintiffs' co-workers apparently prefer it this way---at least they ratified each of the collective bargaining agreements that so provide. Although they don't get statutory overtime pay, they obtain other benefits that aren't available to straight hourly workers. They get a measure of control over their hours and their income. They can choose whether to work longer hours on their routes for more commissions, or shorter hours for lower commissions. (*See, e.g.,* CP 420-21 ¶ 8c.) The Teamsters bargained on their behalf to bolster the commission system rather than to replace it with an hourly wage system. (*See, e.g.,* CP 420 ¶ 8; CP 542.)

In this action plaintiffs seek to overturn that collective bargaining result in state court. They seek an injunction against it not only for themselves, but also for hundreds of their fellow route sales persons, including those who voted for it. (Second Amended Complaint ¶ 3.1)

Petitioner United States Bakery moved to dismiss the action on the ground of federal pre-emption. (*See* Memorandum in Support of Summary Judgment.) The trial judge agreed. (App. B.) In order for him to decide the ultimate issue in the case---whether plaintiffs were "outside salesmen"---he acknowledged that he would have to

interpret the collective bargaining agreement. That is because Washington law (like most states) called for an inquiry into several factors that depended upon the collective bargaining agreements for their resolution: (1) the "purpose" of the employment; (2) whether plaintiffs or petitioner had "control" over plaintiffs' total hours; (3) whether plaintiffs' deliveries of bakery products were "incidental" to their sales; (4) whether plaintiffs had been advised of their status as "outside salesmen." (*See* definition of "outside salesman" at App. J.)

To ascertain the "purpose" of an employment, for example, one would naturally consult the employment contract, which in this case was a collectively bargained employment agreement. The trial judge articulated a dozen or so other ways in which he would have to interpret the collective bargaining agreement and its history in order to decide whether these plaintiffs were "outside salesmen" or not. (App. B-4 *et seq.*)

The trial judge concluded that the decisions of this Court pre-empted him from interpreting the collective bargaining agreements. (App. B-9.) It was therefore for plaintiffs to resort instead to the arbitration process specified in their agreements. (App. B-9.)

The Washington Court of Appeals reversed. In doing so, it attempted to finesse the pre-emption question. It held that the trial court need not even consider the collective bargaining agreements. (App. 6.) To ascertain the "purpose" of the employment, for example, the trial court would simply look to other evidence. For example, the trial court "need only consider evidence as to their job duties." (App. A-6.)

The Washington Supreme Court denied review. The case was remanded for trial.

REASONS FOR GRANTING THE WRIT

The trial court was right to hold this action pre-empted by federal labor law, and the Washington Court of Appeals was wrong to reverse that decision. Plaintiffs should have first pursued their remedy in arbitration. The decision of the Washington Court of Appeals is in acute conflict with federal labor law.

Plaintiffs' state law claim is a head-on challenge to the collective bargaining process. Plaintiffs seek to overturn a result that their own bargaining representative consciously chose on their behalf, that the employer agreed to, and that their co-workers ratified. Furthermore, what plaintiffs attack is not a peripheral aspect of the collective bargaining agreements, but their very core: wages, hours, terms and conditions of employment for hundreds of workers.

The existing conflict between this state court lawsuit and the collective bargaining process is disastrous, no matter how the lawsuit may eventually come out. This lawsuit was filed over three years ago, and obviously has years of life left in it.[2] Since the time it was filed, the existing collective bargaining agreements have expired or are expiring. The shadow of this lawsuit hangs over the current bargaining process for new contracts, for the lawsuit explicitly seeks to enjoin the historical method the

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2 If this Court does not accept certiorari, the next event in the trial court presumably will be to decide whether to certify it as a class action. It is ironic that these plaintiffs declare themselves the representatives of a class consisting of hundreds of their fellow route sales persons, when their fellow co-workers explicitly voted for the *Teamsters* to act as their representative on just such issues.

Teamsters and the Washington bakeries agreed upon to compensate hundreds of route sales drivers. The bargaining parties simply don't know what to do about it now in negotiating the next contracts.[3] They have struggled to articulate complex alternatives that take account of the different ways this lawsuit might come out, but these have failed. Since these negotiations effectively take place on a regional or statewide basis,[4] the labor contracts for Teamsters-organized bakeries in the state of Washington are currently hostage to this lawsuit.

This Court should not misunderstand our argument. We do not here contend that these collective bargaining agreements should override any state-created right to overtime pay that plaintiffs may have possessed. We acknowledge that such a right cannot be bargained away. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 (1981).[5] If the state wage-and-hour law provided,

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3 We are here going a little beyond the record, but that is because the launching of the current negotiations has occurred since the record below was closed. The uncertainty in the current negotiations, however, is well known. In any event, what *is* in the record already is sufficient in itself to support our point. After all, this record does at least show that the time is expiring for the existing collective bargaining contracts, and that the legal dispute about the validity of a key and historic provision is currently up in the air for the indefinite future.

4 Through the technique of pattern bargaining. The first contracts that are negotiated then become a pattern for the rest of the contracts.

5 It is significant, however, that the plaintiff in *Barrentine* did pursue his arbitration remedy. *Barrentine* therefore does not stand for the proposition that a plaintiff may spurn a remedy in arbitration and then file a lawsuit. *Id.* At 741 n 19.

for example, that *all* workers must be paid overtime after 40 hours, we acknowledge that any collective bargaining agreement to the contrary would yield.

But the conflict in this case between the state interest and the federal interest is not that simplistic, although simplistic is how the Washington Court of Appeals unfortunately saw it. For the Court of Appeals, the state statutory interest was paramount; therefore the federal interest in upholding the collective bargaining process must simply yield. In so ruling, the Court of Appeals seriously misconceived the federal right that it was trampling, and thereby trampled it unnecessarily.

I. The Washington Court of Appeals decided an important federal question in a way that conflicts with the decisions of this Court. The Court of Appeals refused to require plaintiffs to arbitrate, thereby ignoring federal pre-emption of plaintiffs' state court claim pursuant to § 301 of the Labor Management Relations Act.

One of the federally protected interests thus trampled was the interest in having disputes about the interpretation of a collective bargaining agreement addressed in arbitration, at least in the first instance. The resolution of plaintiffs' claim in this case does involve a dispute about the interpretation of the collective bargaining agreements. The state statute on which plaintiffs rely provides that whether plaintiffs have any right to overtime pay at all depends, at least in part, on what the Teamsters and the bakery had decided in collective bargaining. To be specific, plaintiffs' claim to overtime pay pursuant to the state statute explicitly depends on who has "control" over

their hours, on the "purpose" of their employment, on what duties are "incidental" to that purpose. (*See* App. I and J.) These are all terms and conditions of employment that can be bargained about, and were.

When a state law claim calls for interpretation of a collective bargaining agreement, this Court has held that it is pre-empted by § 301 of the Labor Management Relations Act. (App. G.)

First, this Court held that a laid-off employee's contract claim in state court for severance pay pursuant to the collective bargaining agreement is pre-empted by § 301, and he must instead follow the grievance and arbitration procedure. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

Next, the Court extended the rule to pre-empt an employee's state law tort claim for bad-faith handling of a disability insurance claim, because the state court would have to interpret the collective bargaining agreement in order to ascertain the duty of the insurer and employer. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 218 (1985). This, said the Court, would undermine the effectiveness of arbitration:

> "The parties here have agreed that a neutral arbitrator will be responsible, in the first instance, for interpreting the meaning of their contract. Unless this suit is pre-empted, their federal right to decide who is to resolve contract disputes will be lost.
>
> * * * Claims involving vacation or *overtime pay*, work assignment, unfair discharge---in short, the whole range of disputes traditionally resolved through

> arbitration---could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness ... as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance."

Id. at 219-20 (emphasis added).

In the same vein was *Electrical Workers v. Hechler*, 481 U.S. 851 (1987) (where "the threshold inquiry for determining if a [tort] cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties," § 301 preempted the claim); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405 n. 4 (1988).

To be sure, none of these cases involved a state law claim of the kind involved in this case, i.e. a claim based on a "nonnegotiable" right. *See Livadas v. Bradshaw*, 512 U.S. 107, 122-23 (1994). The Court did deal with just such a "nonnegotiable" claim---a claim for wrongful discharge for exercising rights under the state's Workers' Compensation Act---and held that it was *not* pre-empted. *Lingle*, 486 U.S. 399. *Lingle*, however, does not undermine the principle on which we rely, for the plaintiff's claim in *Lingle* did not "require...a court to interpret any term of a collective bargaining agreement." *Id.* at 407.

The Court has not yet confronted a case like ours. In the *Lingle* opinion, however, the Court explicitly foresaw our case, and declared how it should come out:

> "It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. *Such a remedy would be preempted by § 301.*"

Id. at 407 n 7 (emphasis added).

The quotation above is our case. On the one hand, the state created a nonnegotiable remedy: a claim to recover overtime pay. (App. H, K.) On the other hand, whether these plaintiffs have a right to overtime pay in the first place depends on the interpretation of their collective bargaining agreements. It depends on who has "control" over their hours, the "purpose" of their employment, what are the "incidental" duties---and all these are matters of collective bargaining. (App. I, J.)

The Washington Court of Appeals, however, refused to follow this Court's statement in *Lingle* that just such a claim would be pre-empted. This Court should grant certiorari because the Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Court.

There is a second distinct reason why this dispute should have gone to arbitration. The grain of sand at the center of this proceeding is the dissatisfaction of these 13 plaintiffs with the circumstances of their jobs: they claimed they did very little selling, and that they were essentially delivery people. (*See, e.g.,* App. B-5.) This kind of dissatisfaction with one's job is the quintessential grist for

the grievance and arbitration process, a process that sometimes can nip disputes in the bud. If plaintiffs had simply filed grievances that their actual assignments did not conform to what had been negotiated for them as "outside salesmen" (CP 425-26 ¶ 17a), this case might never have arisen. There may have been other, simpler ways to remedy their dissatisfaction. (*See* App. L for one of the grievance and arbitration procedures.) In any event, the collective bargaining agreements contained provisions for *non*-sales drivers who received an hourly rate that *did* qualify for overtime. (CP 546.)

Instead of a simple grievance and arbitration procedure, we now have a three-year old proposed class action lawsuit on behalf of *all* route salesmen, with years of additional litigation in store and the threat of an injunction at the end, massive uncertainty within the industry about what to do now, and frayed relations between union and management struggling to solve a problem that has been blown out of proportion.

This Court once summarized the function of the grievance and arbitration process as follows:

> "[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties...The grievance procedure is, in other words, a part of the continuous collective bargaining process."

United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

What these plaintiffs did in filing this action, and what the Court of Appeals did in letting it continue on, is to sabotage that "continuous collective bargaining process" that this Court described above. If the Court of Appeals had honored the paramount federal interest in enforcing the grievance and arbitration procedure, both union and management might know by now what the new contracts for the route sales persons should provide. As it is, everyone will have to wait years for the verdict.

II. The Washington Court of Appeals decision conflicts in another important way with the decisions of this Court. It conflicts with the National Labor Relations Act by crippling the defense of a unionized employer.

There were several different ways the Court of Appeals could have resolved this dispute. It could have agreed with our position stated above. Or it could have rejected our position and held that plaintiffs' claim was not pre-empted, thus permitting the trial court to interpret the collective bargaining agreements.[6]

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6 A different possibility suggested by this Court's opinions is a modified version of pre-emption: plaintiffs might be required to try arbitration first, with the right to pursue their claim in state court later if arbitration failed. *See, e.g., Livadas*, 512 U.S. at 124 n 18 ("Holding the plaintiff's cause of action substantively extinguished may not, as *amicus* AFL-CIO observes, always be the only means of vindicating the arbitrator's primacy as bargained-for contract interpreter.") Plaintiff might be required

(Footnote Continued)

But the Court of Appeals found yet another solution: ignore the collective bargaining agreements altogether. Since the trial court will not be interpreting them, the Court of Appeals apparently thought it won't run afoul of federal pre-emption.

Of all the ways the Court of Appeals could have resolved the dispute, this is the worst. It is a cure that is worse than the sickness. It creates a greater threat to the federal interest than any other option.

To appreciate why this is so, consider as an example the question of the "purpose" of plaintiffs' employment. The outcome of this case may turn on the trial court's evaluation of that purpose---whether it is "outside sales," or not. If the trial court were allowed to interpret the collective bargaining agreements, it might well conclude that the purpose of plaintiffs' employment is indeed "outside sales." That, after all, is what the collective bargaining agreements say. But if the trial court *doesn't* consider the collective bargaining agreements---if it restricts itself to evidence of plaintiffs' "job duties," as the Court of Appeals suggested ---- it might well conclude from that limited evidence that the purpose of their employment is *not* "outside sales." That, after all, is what these plaintiffs would testify. (App. B-5.) The trial court would then conclude that they aren't outside salesmen and would enjoin their compensation system, thus gutting that part of the collective bargaining agreements.

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to go first to arbitration to resolve any part of the claim that required arbitration, without necessarily losing the right to pursue the claim in state court later. *Barrentine*, 450 U.S. at 741 n 19 ("[W]e assume without deciding that a court should defer to a prior arbitral decision construing the relevant provisions of the collective-bargaining agreement.") This may be an appropriate procedure in this case.

The trial court which thus acts in intentional blindness to the existence and terms of the collective bargaining agreements is therefore a worse threat to the federal interest in collective bargaining than the trial court which at least tries to correctly interpret the collective bargaining agreements.

The federal pre-emption policy is like an airport rule that one aircraft must stay clear of the other to avoid collision. The Court of Appeals' application of that rule is to have the one aircraft pretend the other isn't there. If you just shut your eyes and don't look at it, you can't hit it.

The Court of Appeals missed the whole point of federal pre-emption. The ultimate object of federal pre-emption policy is not to keep collective bargaining agreements out of evidence in state court proceedings. It is to keep state courts from unnecessary interference with the collective bargaining agreements. If this state court should later enjoin the route sales persons' compensation system, it will be no consolation that it did so without knowing that it was thereby enjoining a feature of a collective bargaining agreement.

The Court of Appeals' decision therefore calls for the invocation of a second pre-emption doctrine in addition to § 301 pre-emption, a doctrine that this Court articulated pursuant to the National Labor Relations Act. This second pre-emption doctrine prevents a state from imposing an unequal burden on unionized employees. *Livadas*, 512 at 117 n 11, 132. Just as surely it must prevent a state from imposing an unequal burden on a unionized employer.

Our best evidence in defense in this case is the collective bargaining agreements and their history. We have already introduced them into the record. (*See, e.g.*, CP 517 et seq.) If the trial court refuses to consider them,

defendant's defense will be crippled. By contrast, a non-union bakery would be free to use its employment agreements as evidence in its defense. For the Court of Appeals to exclude an employer's best evidence because the employer has the misfortune to be unionized is an unwarranted state interference with collective bargaining that should be pre-empted by the National Labor Relations Act.[7]

III. There is a conflict among the state courts and the federal courts whether this claim is pre-empted under § 301.

The decisions of the lower courts, state and federal, are in conflict about how to apply § 301 pre-emption. They diverge in how to apply the terms "nonnegotiable" and "independent" as used by the Court in the following statement:

> "§ 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law, and * * * it is the legal character of a claim as

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[7] To be sure, the Court of Appeals did not say in so many words that defendant's evidence of the collective bargaining agreements should be excluded when offered. It held instead that the trial court "need only consider" other evidence. (App. A–6 .) The only other way to interpret this, however, is that plaintiffs don't have to rely on the collective bargaining agreements to prove their case, but defendant can rely on them if it wants to. This would amount to a trivial and nonsensical interpretation of the § 301 pre-emption doctrine: that is, federal policy is offended if the collective bargaining agreements are introduced into evidence by plaintiffs, but not if they are introduced by defendant.

> 'independent' of rights under the collective bargaining agreement * * * that decides whether a state law claim may go forward."

Livadas, 512 U.S. at 123.

Jurisdictions like Washington and New Mexico interpret these terms to pre-empt only those claims that are based on the collective bargaining agreement itself. *See Self v. United Parcel Service, Inc.*, 126 N.M. 396, 970 P.2d 582 (1998). These jurisdictions interpret "independent" to mean a claim that may be brought by an individual who is not a member of the collective bargaining unit, i.e. a claim not based on the collective bargaining agreement. A court need only consider the type of claim to determine whether it is pre-empted: if it is not contract-based, it is not pre-empted.

In contrast, federal Courts of Appeal have held that pre-emption does not depend purely on the type of claim, but on whether the claim calls for an interpretation of a collective bargaining agreement. The Seventh Circuit is in this camp. *Atchley v. Heritage Cable Vision Associates*, 101 F.3d 495, 501 (7th Cir. 1996) (statutory claim for failure to timely pay wages turned on the interpretation of the collective bargaining agreement and was pre-empted, even though the remedy was nonnegotiable). The Fourth Circuit appears to be in the same camp. *McCormick v. AT & T Technologies, Inc.*, 934 F.2d 531 (4th Cir. 1991) (state law claim for intentional infliction of emotional distress pre-empted because it requires recourse to the collective bargaining agreement to determine the standard of behavior.)

This Court has acknowledged that all is not clear in the lower courts, and that there is a conflict in how to interpret the pre-emption standard. *Livadas*, 512 U.S. at

124 n 18. The Court has also observed that "The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis." *Lueck*, 471 U.S. at 220-21. This petition provides a needed opportunity.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] Plaintiffs will presumably argue that this Court's recent decision in *Wright v. Universal Maritime Service Corp.*, __ U.S. __, 119 S.Ct. 391 (1998) supports their position. It does not, for several reasons. The most obvious is that *Wright* did not involve any interpretation of a collective bargaining agreement. Neither did the plaintiff in *Wright* seek to vitiate a core provision of the collective bargaining agreement.

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Item Submitted Pursuant to Rule 14.1(i)(vi)

APPENDIX L

Arbitration clause applicable to 12 of the 13 plaintiffs L-1

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class,	)	No. 17312-7-III
Appellants, v. SNYDER'S FOODS, INC., a Washington Corporation,	)	Division Three Panel One
Defendant.	)	
UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation,	)	PUBLISHED OPINION* FILED MARCH 30, 1999
Respondent.	)	

KATO, J. – Route drivers for Snyder's Bakery, Inc., appeal the summary judgment dismissal of their overtime wage claims. We reverse.

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*[Note by petitioner's counsel:] Published by order of May 4, 1999. This opinion was originally designated as an "Unpublished Opinion," but publication was ordered after appellants argued that it was a significant decision.

John Schneider and 12 other employees of United States Bakery d/b/a Snyder's Bakery, Inc., (Snyder's) filed a class action lawsuit against their employer for unpaid overtime compensation. All the employees are route drivers who receive a commission on their individual sales plus a fixed salary. They are members of the Teamsters Union, which has a collective bargaining agreement with Snyder's that classifies route drivers as exempt salesmen. The complaint alleges that despite their working in excess of 40 hours a week, they have not received overtime as required by RCW 49.46.

Snyder's asserted these affirmative defenses: (1) failure to state a claim upon which relief can be granted, (2) statute of limitations, (3) preemption by the Labor Management Relations Act of 1947 (LMRA), and (4) failure to exhaust administrative remedies. Claiming the LMRA preempted the overtime claims, Snyder's moved for summary judgment. The court agreed and granted summary judgment dismissal. This appeal followed.

We review an order of summary judgment by engaging in the same inquiry as the trial court. *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 123, 839 P.2d 314 (1992). An order of summary judgment is appropriate when there is no genuine issue of material fact. CR 56(c); *Ervin v. Columbia Distributing , Inc.*, 84 Wn. App. 882, 886, 930 P.2d 947 (1997). The court must consider the facts in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate only if, after considering all the evidence, reasonable persons could reach but one conclusion. *Commodore,* 120 Wn.2d at 123.

The route drivers contend they were entitled to overtime compensation pursuant to RCW 49.46, the Minimum Wage Act (MWA). Snyder's argues these claims

were properly dismissed because they are preempted by the LMRA. Although federal law does not generally preempt the MWA, section 301 of the LMRA, 29 U.S.C.A. § 185 (West Supp. 1978), authorizes federal courts to resolve disputes involving collective bargaining agreements. *Ervin,* 84 Wn. App. at 888-89. Section 301 preempts the application of state law to interpret or enforce these bargaining agreements. *Commodore,* 120 Wn.2d at 126. Only those claims which are founded directly on rights created by a collective bargaining agreement and those substantially dependent upon construction of the agreement are governed by section 301. *United Food & Commercial Workers Union Local I00I v. Mutual Benefit Life Ins. Co* , 84 Wn. App. 47, 51, 925 P.2d 212 (1996), *review denied,* 133 Wn.2d 1021 (1997). Federal law does not preempt claims based upon state law when the law grants employees nonnegotiable substantive rights and when adjudication of those rights does not depend on the collective bargaining agreement. *Id.*

Rights established by state law are nonnegotiable when they cannot be waived, alienated, or altered by private agreement. *Id.* at 51. The MWA establishes a minimum standard for wages and working conditions for all employees. *Id.* (citing RCW 49.46.120). Under the MWA, employees have the right to overtime when they work more than 40 hours a week. RCW 49.46.130. In enacting these protections, the Legislature has stated that collective bargaining agreements may establish wages or other work conditions only in excess of the statutory minimums. RCW 49.46.110; *United Food & Commercial Workers,* 84 Wn. App. at 52, Accordingly, the rights provided by the MWA may not be waived by a collective bargaining agreement. *Ervin,* 84 Wn. App. at 891.

When a state law claim is independent or does not require interpretation of the collective bargaining

agreement, section 301 does not preempt the claim. A state claim is independent of a collective bargaining agreement if it can be asserted without reliance on an employment contract. *Commodore,* 120 Wn.2d at 130-31; *Ervin,* 84 Wn. App. at 889.

This court in *Ervin* determined that claims under the MWA are not preempted by section 301. *Ervin,* 84 Wn. App. at 888. Mr. Ervin sought unpaid overtime from his employer. At the beginning of his employment, he was advised that his employer would not pay overtime wages. The union contract guaranteed him 40 hours' pay each week. Mr. Ervin did not work fewer than 8 hours in a day and began keeping track of the number of hours he worked. The collective bargaining agreement provided for time-and-a-half pay for hours worked in excess of 10 in a day or 40 in a week. Mr. Ervin quit his job and filed suit seeking overtime compensation.

On the employer's motion for summary judgment, the trial court dismissed the complaint. *Id.* at 886. On appeal, this court determined Mr. Ervin's claim was not preempted by section 301 because he could assert his claims without relying on the collective bargaining agreement. *Id.* at 890. The court stated that the rights provided by the MWA could not be waived or altered by a collective bargaining agreement and employees were not required to arbitrate these "nonnegotiable" claims. *Id.* at 891.

The general preference for arbitration was outweighed by the statutory requirements of the MWA and the strong public policy against depriving union employees of statutory rights that would be available to nonunion employees. *Id.*

Here, like *Ervin,* the route drivers brought an action for unpaid overtime under the MWA. They can assert this claim without relying on the collective bargaining agreement. If the claims were preempted, they would be forced to arbitrate in violation of public policy since these union employees would be deprived of rights afforded to their nonunion counterparts. The court erred by granting summary judgment dismissal based on preemption.

Snyder's argues summary judgment was nonetheless appropriate because the court must interpret the collective bargaining agreement in order to determine if the route drivers are entitled to overtime. RCW 49.46.130 provides that, except for persons exempted under RCW 49.46.010(5) as outside salesmen, any employee who works more than 40 hours a week is entitled to overtime. Snyder's claims the route drivers are outside salesmen pursuant to RCW 49.46.010(5)(c) and are thus exempted from overtime. The statute defers to the rules of the director of labor and industries to define and delimit the term "outside salesman."

WAC 296-128-540 defines an outside salesman as any employee:

(1) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business, as well as on the premises (where the employee regulates his own hours and the employer has no control over the total number of hours worked) in the following alternative activities:

(a) In making sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or

(b) In obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; or

(c) In demonstrating products or equipment for sale; or

(d) In the sale of services and performance of the service sold when the compensation to the employee is computed on a commission basis; and

(2) Whose hours of work of a nature other than that described in (1)(a), (b), (c) and (d) of this section do not exceed 20 percent of the hours worked in the work week by nonexempt employees of the employer: Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work; and

(3) Who is compensated by the employer on a guaranteed salary, commission or fee basis and who is advised of his status as "outside salesman."

If the route drivers meet the definition of outside salesmen, they would not be entitled to overtime compensation. Snyder's claims the court cannot determine if they fall under this definition without interpreting the collective bargaining agreement. But the court need not interpret the collective bargaining agreement to make that determination. The court need only consider evidence as to their job duties. In any event determining whether the route drivers are indeed outside salesmen involves genuine

issues of fact which cannot be resolved by summary judgment. *See Ervin,* 84 Wn. App. at 894-95.

Reversed.

/s/_____
Kato, J

WE CONCUR:

/s/_____
Sweeney, A.C.J

/s/_____

Brown, J.

APPENDIX B

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class,	)	Civil No. 96-2-02446-4
Plaintiffs,	)	
v.	)	
SNYDER'S FOODS, INC., a Washington Corporation, and UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation,	)	
Defendants.	)	

VERBATIM REPORT OF PROCEEDINGS
ORAL OPINION
THE HONORABLE MICHAEL W. LEAVITT
Yakima, Washington
January 9, 1998

(In Open Court)

THE COURT: Thank you. As I indicated when we started, I have read the submissions by both sides. And including the collective bargaining agreement, trying to get a flavor for them and what was referenced in those documents. And also because they were referenced by both sides in your briefing.

Really, the ultimate issue in this case is going to be whether or not the plaintiffs are outside salesmen under the provisions of RCW 49.46.010(5)(c), which really only says that if you are – the definition of employee defines that as, I can't remember exactly the words, but one of the terms is if you are an outside salesman then it references that term as defined by the director and limited by the director. So you go to the [Washington Administrative Code] then and the WAC sets forth a specific definition under 296-128-540, very specifically a number of items that comprise the definition of outside salesmen.

In fact, there are three paragraphs, [1] which contains the four subdivisions, and paragraph (2) and paragraph (3).* The first one being whether or not the person is employed for the purpose of and who is customarily and regularly engaged away from the business of his employer and involved in the following activities and then it states four different types of activities in the alternative.

(2), is relative to the percent of hours worked in the work week by the nonexempt employee, being not exceeding 20 percent of those activities specified in No. (1), (a), (b), (c), or (d). Provided that the work

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*[Note by petitioner's counsel:] Reproduced at App J-1 below.

performed is not incidental to or in conjunction with those activities. So that is a separate thing that the court would look at. And then (3) is whether the nature of compensation, whether it's on a guaranteed salary, commission, or fee basis. And then also if the person has been advised of their status as outside salesman, in quotes.

Now that's [how] the [Washington Administration Code] defines this term. Ultimately that is the issue that has to be decided on this claim, because once that issue is defined, it seems to me that the steps are very clear. I mean very clear. And if in fact these plaintiffs are not exempt, I mean it is very clear then we find out the number of hours and the rate of pay and apply that, period. So the central issue ultimately is are they outside salesmen?

Now the issue for this hearing on this summary judgment is whether or not this court, or a court in the state jurisdiction in looking at the issue of outside salesmen would need to look to the [collective bargaining agreement] to make that determination, or whether that determination could be made independent of the collective bargaining agreement?

Now, since I look at the provisions of the [Washington Administrative Code], you look at the activities performed, you look at whether they have been advised that they are considered outside salesmen, that's in the provision specifically. Whether they function away from the employer's place of business. Whether the employer controls the total hours worked in other areas. How they are compensated and those kinds of things. And so can a court then sitting here and reviewing these factors, and the definition set forth in the [Washington Administrative Code], determine those issues without looking to the provisions of the [collective bargaining agreement]? And I ask myself this question, would the

court need to understand and analyze why the parties to a collective bargaining agreement, specifically the one [that] specifically agrees that they are outside salesmen, would the court need to analyze that? What role or what effect does that have in making that determination? Is it relevant?

Clearly you would think it is relevant evidence that could be submitted. Is it the only evidence? No, I mean there are a number of provisions in the [Washington Administrative Code] that would indicate there are a number of things you are looking at, so that is not the only thing, but that is something there. What information was considered by the union representative and the employer in making that determination? Does the court need to know that? If I need to know that, aren't I really analyzing then and construing the collective bargaining agreement? If I don't need to know that, what role would the collective bargaining agreement play? If this issue was decided independently would that decision have an impact on the construction, interpretation, or application of a collective bargaining agreement?

I think that's another question I have to ask myself and I have asked myself as I have gone through this. Because frankly, the quality of the briefing here has been very, very good. And I have gone back and forth on this as I have gone through and studied this issue. But finally as I have been able to get this in focus as to what we are really focusing on here in this hearing, it is--it has helped to put that in focus and clearly analyze it in the sense of what is the issue here and does the court need to look at the [collective bargaining agreement], or can this be determined independent of the [collective bargaining agreement]? I asked my question, wouldn't the court have to analyze why the collective bargaining agreements create different categories of jobs, including the driver, delivery men who are paid overtime and that's provided in the

collective bargaining agreement. And why the category, that category is different from an outside salesman, who is on commission with the base. There is a provision in the collective bargaining agreement that provides that the employer may distribute private or secondary legal products to fast food accounts, by either hourly rated drivers or using outside salesmen on a commission, that's a provision in there. I am aware of the commission of the plaintiffs, really their service and the activities, the things that they are doing substantially are that they are delivering product and that's it, they are not selling. How do I, how do I put all this together when I have provisions in an agreement that says that they can be distributed through hourly paid people, or through outside salespeople and these plaintiffs are all outside salespeople, yet they are, there is a provision the company could use hourly rated people. So what is the purpose of having that there and how does that fit with the category, that of outside salespeople? Why the difference in the agreement?

Those are questions that I have asked as I have gone through this. As I pointed out here, the plaintiffs claim that essentially they are delivery people. They do very little sales work. They deliver to accounts that have been in existence. They sell product, but the bulk of their work that's done is delivery work. And so the court would ask the question, can I make a determination as to that issue without understanding the considerations or the analysis that went into those distinctions that are set forth in the collective bargaining agreements? If the court is, if that's necessary to do that, isn't the court then analyzing or construing the collective bargaining agreements? It would seem to me that I would be doing that if that was a necessary element in this consideration.

I ask, is there a significance, is there significance to the fact that the collective bargaining agreements contain

provisions about inside salesmen, have an inside salesman provision and pay with respect to that? And what is the distinction between those positions, an outside salesmen, and was there any discussion what was the purpose for that as we analyze the activities and the duties of the plaintiffs, because ultimately that is one of the key factors as set forth in the [Washington Administrative Code]. What's the significant of the collective bargaining agreement containing a noncompete clause for outside salesmen only? And under none of the other categories is that a relevant fact to the determination as to this issue and the purpose of their employment, because I do think that under the [Washington Administrative Code] that the purpose is one of the considerations. Activity is clearly one of the considerations. Compensation, method of compensation is one of the considerations. Whether the plaintiffs were advised that they were outside salesmen is one of the considerations.

As to whether the plaintiffs were advised that they are outside, they are considered by the employer to be outside salesmen, what role does that statement in the Yakima agreement that they are considered outside salesmen have to play in that? Doesn't the court have to look at that? The court, can that be independent of the court's analysis of that issue? Why are overtime provisions contained in the collective bargaining agreements for other categories of workers except not for outside sales? Because it's clearly overtime is provided. And what analysis and consideration and negotiation discussions came into play with respect to that? And some of the other agreements that have been made here with respect to the give and take on some other things to increase what would appear to be the ability to increase their commissionability for products. Do those factors come into play in a determination of this issue by the court? If they do, clearly the [collective bargaining agreement]s have a significant

role, or at least are and are really intertwined with this whole analysis of whether or not the plaintiffs are outside salesmen.

I guess the question also came up to this court as I went through this, is what role did the plaintiffs play in interacting with their union representative in placing these provisions in the [collective bargaining agreement], or is this an admission of sorts with respect to that? Now I appreciate to you that is not by itself determinative of that issue. But again, it's a factor. It's out there and it has to be dealt with in the total analysis of everything that's going on. And if the court got into that, am I getting into again an analysis and a discussion and interpretation of the [collective bargaining agreement]? Would the plaintiffs in cross-examination in state court, would the defendant be entitled to ask them about those, those provisions? If they do, is that going into an interpretation of construction analysis of the [collective bargaining agreement]? What basis or authority would the court have not to allow that kind of an inquiry? I can't think of any. Because clearly that's relevant in the court's mind because it addresses this.

Now, if this court were to rule that the provisions of the [collective bargaining agreement] are independent of the plaintiff's claims here, then I ask myself what would the effect of those provisions of the [collective bargaining agreement] have, what would be the situation that would have the [collective bargaining agreement]s here, the court's ruling? Clearly the provision that these plaintiffs are outside salesmen, that would be avoided, that would be very clear, this court can't sit here and say after analysis that these folks are not outside salesmen, that [they] are not exempt, if we are going to proceed to find out, then their number of hours and apply their rate of pay and that is going to be their compensation. Clearly provisions regarding commissions and rate of pay would be impacted

as to these parties. I mean I don't know how else you could, I don't know how you could separate them. What weight should the court place on the fact that the legal and recognized bargaining agent for these plaintiffs had agreed to those provisions? Isn't that a consideration the court would have to make in this analysis of this issue? Clearly the provisions of the [collective bargaining agreement] could not be ignored in resolving the issues in this case. I don't see how I could, how any judge could go into this and not and ignore the fact that I have got collective bargaining agreements out there that speak to at least some of the factors that are set forth in the [Washington Administrative Code].

Now that doesn't mean that we're in any way impairing any of the rights of these parties. That does not make a distinction between the union and nonunion. I would not tolerate that one minute. Because the issue here before the court, the threshold issue itself that's got to be decided is are they an outside salesman and what are the factors that have to be looked into in order to determine that? And what are those factors? And can that determination be made independent of an analysis and construction of the collective bargaining agreements? I cannot see how it can be. I cannot see how it can be. It would seem to me that the collective bargaining agreements are so intertwined with that issue of whether or not the plaintiffs are outside salesmen, that it has, the collective bargaining agreements have to be analyzed and those provisions have to be reviewed, and an interpretation made as to what it is that those provisions made and what was the basis for those provisions even going into those agreements, what decisions took place, what role did the plaintiffs play in actually making those statements on having those provisions being there?

It would seem to me that that, this cannot be separated from the collective bargaining units, that issue, the determination of that issue and whether [they] are outside salesmen. Once that issue is decided, that decides in my mind really the key issue in this case. As I said, as we start out if in fact they are not exempt, it seems to me that some of the cases cited by the plaintiff relative to, I am trying to think of the word, the off clock, when the person would go off clock, I mean those kinds of issues can be clearly determined by what then transpired. But here we have, this is unique to all the cases cited by all the parties, we have collective bargaining agreements that even in fact refer to this issue. I don't believe and I am not suggesting here that the fact that the collective bargaining agreement denotes the plaintiffs as outside salesmen is dispositive of this issue, I am not inferring that. But I am stating very clearly that I believe that because the collective bargaining agreement makes that reference and sets up the mode of compensation and for these other purposes that I have stated, these other questions that seem to be intertwined with this issue that you cannot, a court cannot make a determination of that issue without referencing the collective bargaining agreements and at least construing or analyzing what is happening and what was intended and what was meant by those documents.

So for those, for that purpose, for those reasons, counsel, I am going to grant your motion with respect to the exemption. And as you know, that is not the end of this matter. That simply allows this decision to be made, provides for this decision to be made in a different forum. Counsel, you can present the court with an appropriate order.

MR. KOEHLER: I will do that, Your Honor, thank you.

THE COURT: Counsel, let me just again, I mentioned to both of you in the course of my discussion here that I appreciated very much that it was a lot, but it was well done. It focused the issue for me and that was very helpful to the court. It's a pleasure really to have well briefed issues. And I know that's no solace to one side or the other when they have a decision to be made, but at least is intended by this court to indicate the quality of the representation that you have given to your clients and I appreciate that. So, thank you both very much.

Is there anything further, Mr. Johnson?

MR. JOHNSON: Well, Your Honor, allow me to say that as Mr. Koehler had represented, Your Honor, in his final rebuttal remarks, that certainly while there may be disagreement between counsel here with Your Honor's decision, I do respect and appreciate the fact that the court has taken the time to read in great detail, not just the briefs, but the cases that are there and collective bargaining agreement. It's very clear Your Honor has an understanding of the matter and we do appreciate that.

THE COURT: Thank you, Mr. Johnson, I know these are difficult issues, it was a very difficult thing, I spent a lot of time on it, but that's my job. But again, I appreciate your efforts and both sides here are well represented, and there is quality representation here, I appreciate it.

Nothing else then, counsel, thank you very much. And the court is adjourned. You will present an order to me?

MR. KOEHLER: I will present an order and I will run it by plaintiff's counsel first.

THE COURT: If there is a problem about the form of the order we can do it by telephone conference if you would like to save a trip over. And I just offer that as a suggestion if you would like to do that.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: Thank you, very much.

ADJOURNED

APPENDIX C

THE HONORABLE MICHAEL W. LEAVITT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF YAKIMA

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class, Plaintiffs, v. SNYDER'S FOODS, INC., a Washington Corporation, and UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation, Defendants.	Civil No. 96-2-02446-4 **ORDER AND JUDGMENT OF DISMISSAL**

This Court heard Defendant United States Bakery's Motion for Summary Judgment on January 9, 1998. The Court had reviewed all the briefs and affidavits submitted by the parties, and heard argument of counsel. The Court finds that this case is preempted by the Sec. 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Now therefore,

IT IS HEREBY ORDERED that Defendant United States Bakery's Motion for Summary Judgment is GRANTED, and this case is DISMISSED with prejudice.

DATED this 18th day of February, 1998.

/s/_____
Michael W. Leavitt
Superior Court Judge

APPENDIX D

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

Division III

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class,	)	No. 17312-7-III
Appellants, v. SNYDER'S FOODS, INC., a Washington Corporation,	)	ORDER DENYING MOTION FOR RECONSIDER-ATION
Defendant.	)	
UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation,	)	
Respondent.	)	

THE COURT has considered respondent's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of March 30, 1999 is hereby denied.

DATED: May 4, 1999

FOR THE COURT: /s/_____
JOHN A. SCHULTHEIS
CHIEF JUDGE

APPENDIX E

THE SUPREME COURT OF WASHINGTON

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class, Respondents, v. SNYDER'S FOODS, INC., a Washington Corporation, Defendant. UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation, Petitioner.	NO. 68146-5 **ORDER** C/A NO. 17312-7-III

Department II of the Court considered this matter at its November 2, 1999, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 2nd day of November, 1999.

/s/
RICHARD GUY
CHIEF JUSTICE

APPENDIX F

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class,	**MANDATE**
Appellants,	No. 17312-7-III
v.	Yakima County
SNYDER'S FOODS, INC., a Washington Corporation,	No. 96-2-02446-4
Defendant.	
UNITED STATES BAKERY, INC., d/b/a SNYDER'S BAKERY, INC., a foreign corporation,	
Respondent.	

The State of Washington to: The Superior Court of the State of Washington, in and for **Yakima** County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on **March 30, 1999** became the decision terminating review of this court in the above-entitled case on **November 2, 1999**. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance

with the attached true copy of the opinion. **Costs in the amount of $849.25 are awarded to Appellant, to be paid by Respondent.**

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 15th day of November, 1999.

/s/ Patricia I. Crandall
Clerk of the Court of Appeals, State of Washington
Division III

APPENDIX G

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

APPENDIX H

RCW 49.46.130. Minimum rate of compensation for employment in excess of forty hour work week – Exceptions.

(1) Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) This section does not apply to:

(a) Any person exempted pursuant to RCW 49.46.010(5) ["outside salesman" and others].*

* * *

* [Note by petitioner's counsel:] In 1997, the Washington Legislature added a sentence to this statute, but it has no direct bearing on this case. It was intended to overrule a Washington Court of Appeals decision. *Boykin v. Boeing Co.*, 128 F.3d 1279, 1282 (9th Cir. 1997).

APPENDIX I

RCW 49.46.010. Definitions.

As used in this chapter:

* * *

(5) "Employee" includes any individual employed by an employer but shall not include:

* * *

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the Washington personnel resources board pursuant to chapter 41.06 RCW.

* * *

APPENDIX J

WAC 296-128-540 Outside salesman. The term "individual employed in the capacity of outside salesman" in RCW 49.46.010 (5)(c) shall mean any employee:

(1) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business, as well as on the premises (where the employee regulates his own hours and the employer has no control over the total number of hours worked) in the following alternative activities:

(a) In making sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or

* * *

(c) In demonstrating products or equipment for sale; or

* * *

(2) Whose hours of work of a nature other than that described in (1)(a) [and (c)] of this section do not exceed 20 percent of the hours worked in the work week by nonexempt employees of the employer: *Provided,* That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work; and

(3) Who is compensated by the employer on a guaranteed salary, commission or fee basis and who is advised of his status as "outside salesman."

APPENDIX K

RCW 49.46.090. Payment of wages less than chapter requirements – Employer's liability – Assignment of wage claim.

(1) Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between such employee and the employer to work for less than such wage rate shall be no defense to such action.

* * *

APPENDIX L

GRIEVANCE AND ARBITRATION CLAUSES

The following are the grievance and arbitration clauses of the most recent collective bargaining agreement that applies to 12 of the 13 named plaintiffs (CP 536-38):

ARTICLE 27 – SETTLEMENT OF GRIEVANCE

27.1 The Business Representative and the Manager of the bakery shall settle all grievances arising from causes of this Agreement and shall be binding to both parties. In the event the parties are unable to agree on a settlement, the grievance shall then be processed pursuant to the provisions of Article 30.

* * *

27.2 27.3 A dispute or grievance involving wage rates, overtime or other matters involving the pay of employees may be filed at any time, but retroactive compensation shall be limited to forty-five (45) calendar days preceding the date of filing with the Union.

ARTICLE 30 – ARBITRATION

27.3 Should differences arise between one or more Employers of the bakery industry and the Union, or its members employed by the Employer, as to the interpretation, construction and disputes of any nature of this Agreement, an earnest effort will be made by both parties to settle any differences immediately. If not settled within a ten (10) day time period, either party may notify the other party by letter that the matter be referred to a Joint Labor Relations Committee.

27.4 A joint Labor Relations Committee shall be organized for any and all bakeries operating under this Agreement and shall have authority to settle all controversies as to the interpretation, construction and disputes of any nature of this Agreement. * * *

* * *

27.5 The Joint Labor Relations Committee shall promptly arrange a conference and a decision shall be made not later than fifteen (15) working days, unless mutually agreed to the contrary by both parties. The decision of the Committee shall be binding on all parties involved.

* * *

27.6 30.7 It is understood and agreed that the above grievance procedure is adequate to settle all grievances as to the interpretation and construction of this Agreement[.] * * *

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321No. 99-1292

In The

Supreme Court of the United States

October Term, 1999

UNITED STATES BAKERY, INC., D/B/A SNYDER'S BAKERY, INC., A FOREIGN CORPORATION,

Petitioner,

v.

JOHN SCHNEIDER, ET AL., INDIVIDUALLY AND ON BEHALF OF THE CLASS,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Washington (Division III)

MOTION FOR LEAVE TO FILE BRIEF, *AMICI CURIAE*, AND BRIEF OF *AMICI CURIAE*, AMERICAN BAKERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS & SNACK FOOD ASSOCIATION, IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF, *AMICI CURIAE*

Pursuant to Rule 37.2(b) of this Court, the American Bakers Association ("ABA"), the National Association of Manufacturers ("NAM") and the Snack Food Association ("SFA"), by their undersigned counsel, hereby move for leave to file their brief as *Amici Curiae* in support of the Petitioner, United States Bakery, Inc. d/b/a Snyder's Bakery, Inc.* In support of their Motion, the ABA, NAM and SFA state:

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* Prior to filing this Motion, the ABA, NAM and SFA sought the consent of both parties to the filing of its brief, as required by Rule 37.2 of this Court. The Petitioner consented to this request, however, the Respondents refused to consent, necessitating this Motion.

The ABA is the trade association that represents the nation's wholesale baking industry. Its membership consists of more than 300 wholesale bakery and allied services firms. These firms comprise companies of all sizes, ranging from family-owned enterprises to companies affiliated with Fortune 500 corporations. Together, these companies produce approximately 80 percent of the nation's baked goods. The members of the ABA collectively employ tens of thousands of employees nationwide in their production, sales, and distribution operations. The ABA, therefore, serves as the principal voice of the American wholesale bakery industry.

ABA members include the majority of Washington's wholesale baking companies, with over $268 million in annual sales statewide. These wholesale baking companies have over 90 facilities in Washington, including seven major bakeries and in excess of 80 distribution depots. ABA members in Washington employ more than 2,600 employees, including more than 850 driver-salespersons who cover nearly 800 sales routes throughout the state.

The National Association of Manufacturers – "18 million people who make things in America" – is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 11 additional offices across the country.

The Snack Food Association ("SFA") is the international trade association of the snack food industry representing snack manufacturers and suppliers to the snack industry since 1937. Over 800 snack food manufacturers and suppliers are members of SFA. SFA acts as the voice

for the snack food industry before government, compiles snack industry sales data and promotes increasing snack consumption, and provides technical support to its members through videos, seminars and publications. Retail sales of snack foods in the U.S. total more than $18 billion annually.

The ABA, NAM and SFA believe that their participation as *Amici Curiae* will benefit the Court in this proceeding. These organizations and their members bring a unique "hands-on" perspective to the consideration of the linkage between the distribution of products, and the labor contract mechanisms, including sales commission incentives, that commonly are incorporated into contracts with unions representing driver-salespersons. A number of member-companies of these national trade associations have implemented, through labor contracts, compensation and distribution arrangements that are similar to the mechanism challenged in this proceeding.

In this regard, members of each group also have experience with collective bargaining agreements that play an important role in defining the jobs and tasks of driver-salesperson positions. They have first-hand familiarity with the manner in which unions representing driver-salespersons consider those workers' duties before agreeing to contractual terms that define their jobs and set their compensation. They also have a national view of the manner in which challenges to collective bargaining agreements through state wage-hour claims, can and will have a dramatic and adverse effect on the stability of labor-management relations in a broad range of industries.

WHEREFORE, the ABA, NAM and SFA respectfully request that the Court grant their motion and permit their filing of the accompanying brief, *Amici Curiae*, in support of the Petitioner.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE*, AMERICAN BAKERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS & SNACK FOOD ASSOCIATION, IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICI[1]

The American Bakers Association ("ABA") is the trade association that represents the nation's wholesale baking industry. Its membership consists of more than 300

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[1] The ABA, the NAM and the SFA hereby certify, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part. In addition, no person or entity, other than the ABA, the NAM and the SFA, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

wholesale bakery and allied services firms. These firms comprise companies of all sizes, ranging from family-owned enterprises to companies affiliated with Fortune 500 corporations. Together, these companies produce approximately 80 percent of the nation's baked goods. The members of the ABA collectively employ tens of thousands of employees nationwide in their production, sales, and distribution operations. The ABA, therefore, serves as the principal voice of the American wholesale bakery industry.

ABA members include the majority of Washington's wholesale baking companies, with over $268 million in annual sales statewide. These wholesale baking companies have over 90 facilities in Washington, including seven major bakeries and in excess of 80 distribution depots. ABA members in Washington employ more than 2,600 employees, including more than 850 driver-salespersons who cover nearly 800 sales routes throughout the state. The driver-salespersons in Washington have an average tenure of nearly 10 years, and average weekly wages of $827.77. *All* of these driver-salespersons are covered under collective bargaining agreements negotiated between their employers and the International Brotherhood of Teamsters.

The National Association of Manufacturers – "18 million people who make things in America" – is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 11 additional offices across the country.

The Snack Food Association ("SFA") is the international trade association of the snack food industry representing snack manufacturers and suppliers to the snack

industry since 1937. Over 800 snack food manufacturers and suppliers are members of SFA. SFA acts as the voice for the snack food industry before government, compiles snack industry sales data and promotes increasing snack consumption, and provides technical support to its members through videos, seminars and publications. Retail sales of snack foods in the U.S. total more than $18 billion annually.

A core question in this case is whether Section 301 of the Labor Management Relations Act ("LMRA") preempts a claim under the Washington Minimum Wage Act ("WMWA") as it applies in the particular factual setting of unionized wholesale bakery driver-salespersons in Washington. This issue is of direct relevance and great concern to companies that distribute food and other consumer products. Members of the ABA, NAM and SFA distribute products in the State of Washington. In certain of these distribution arrangements, members of these organizations utilize compensation systems similar to that of the Petitioner, that are implemented in unionized work environments through collective bargaining agreements.

Indeed, in largely unionized sectors (e.g., the wholesale baking industry), the collectively bargained-for provisions at issue are nearly ubiquitous. As such, the outcome of this case will have serious and far-reaching effects on employers operating in the State of Washington. Moreover, through the extension of the incorrect analysis in the state court decision at issue, this case threatens to have a widespread impact nationally, in many sectors. It well may be disruptive of established systems of compensation in multiple jurisdictions. It certainly will impact a large number of collective bargaining relationships, and could result in changed methods of distribution in many parts of the country.

The decision of the Washington Court of Appeals calls into question the doctrine of LMRA preemption, and ignores critical aspects of the factual setting in this case. The compensation arrangement that is the subject of the Respondents' challenge resulted from extensive negotiations and consultation not only between the employees' representatives and the industry but also with the Washington State Department of Labor. The Washington Court of Appeals ignored this history when it effectively concluded that the Respondents' state law claims are *not* inextricably intertwined with the provisions of their collective bargaining agreements.

A definitive ruling from this Court on the correct application of the appropriate preemption analysis not only would resolve the dispute for the parties, but also would provide critical and necessary guidance nationally. As the Petitioner notes, uncertainties regarding the extent to which employers can rely on contractual provisions that structure exempt job duties can severely disturb otherwise harmonious labor relations.

This concern, however, and the impact of the State court ruling, extend well beyond driver-salespersons in the bakery industry, affecting any collective bargaining relationship in which the classification of employees is a critical factor. Consequently, the *Amici* and their member-companies have a keen interest in this Court's favorable action on the Petition for a Writ of Certiorari, to resolve questions that otherwise will face many parties in addition to the litigants directly interested in this proceeding.

INTRODUCTION AND SUMMARY OF ARGUMENT

Thirteen driver-salespersons[2] employed by Petitioner United States Bakery, Inc. d/b/a Snyder's Bakery, Inc. ("Snyder's"), have brought suit against Snyder's, claiming that they are due overtime compensation for hours worked over 40 in a week.

The terms and conditions of the Respondents' employment with Snyder's are governed by two collective bargaining agreements ("CBAs") negotiated between Snyder's and the Respondents' representative, the International Brotherhood of Teamsters ("Teamsters"). Among the provisions included in these agreements are clauses defining driver-salesperson job responsibilities, compensation structure, and rights. Among these are the right to seek redress of grievances that involve misclassification, rates of pay, and the like.

The relevant provisions of the CBAs at issue have been crafted carefully over years of negotiations. They reflect the parties' intent that driver-salesperson positions are structured as outside sales jobs exempt from overtime compensation, and provide a grievance mechanism for individuals who may feel their employment does not satisfy the commitment to outside salesperson status the contract guarantees them.

The Washington State trial court was presented with extensive evidence demonstrating how the collective

---

[2] The job position in question is referred to by various terms, including "salesman," "bakery salesman," "commission driver-salesman," "route salesman," "driver-salesperson," "route sales representative," "sales driver," "route sales driver," and "driver sales representative." For the sake of convenience and uniformity, the term "driver-salesperson" will be used to describe the position in which the Respondents are employed.

bargaining provisions at issue evolved. The history of negotiations over the driver-salesperson designation and job duties stretches back more than ten years. During the 1988 contract negotiations, the Teamsters chose to focus their attention on the status of driver-salespersons under the WMWA. The Teamsters made a concerted effort to consult with industry representatives regarding the duties that driver-salespersons performed, and the best ways to maximize their compensation and job satisfaction. Based on these consultations, industry and the Teamsters agreed that the driver-salespersons clearly functioned as "outside salespersons," as that term is defined under the WMWA, and the resulting CBA provisions reflected this agreement.

The State of Washington endorsed the agreement of the parties as well. On January 23, 1989, the Washington Department of Labor and Industry – the agency charged with enforcing the WMWA and which drafted the regulations governing outside salespersons – issued an opinion on the classification question. It stated that the driver-salespersons described in the CBAs were indeed "outside salespersons" under the WMWA, and were, therefore, exempt from the statute's overtime requirement. That opinion in essence validated the parties' interpretation of the compensation laws governing the position.

Subsequent contract negotiations in 1990-1991, 1992, and 1994-1999 worked from this understanding, and strengthened the outside sales provisions at issue by gearing driver-salesperson compensation and benefits toward incentive-based sales duties and away from hours-based compensation. During the 1990-1991 contract negotiations, in response to a letter from a Teamsters member, the Teamsters convened a meeting of representatives throughout Washington regarding this issue, and confirmed their understanding that the driver-salespersons described in the CBAs were exempt under the WMWA. In response to a

grievance, the Teamsters negotiated for driver-salespersons to be given additional sales time, and for industry support of the driver-salespersons in their efforts to increase the number of sales displays that retail outlets would allow them to erect. Finally, in 1992 the Teamsters negotiated to add a "route review" provision, under which driver-salespersons who felt their job duties did not leave them enough time to focus on generating new sales could have their routes and duties reviewed and adjusted by management and the Teamsters.

Contract negotiations from 1994-1999 further focused on the sales aspects of driver-salesperson positions, continuing to de-emphasize pay provisions related to hourly work. The Teamsters negotiated an increase in commissions for certain products in exchange for the elimination of so-called "premium" or "penalty" pay provisions, under which driver-salespersons were given additional compensation for hours worked in excess of 45 per week. The result was that the Respondents – like most driver-salespersons in the Washington wholesale bakery industry – are compensated with a fixed salary plus commissions.

In this way, the negotiations between the Teamsters and the Washington wholesale bakery industry, the resulting CBA provisions, and the rights accorded to driver-salespersons under the CBAs became inextricably intertwined with a determination of the driver-salespersons' exempt status under the WMWA.

Consequently, when the Respondents brought suit, Snyder's moved for summary judgment, on the ground that the suit necessarily involved an interpretation of the CBAs at issue and therefore was preempted by Section 301 of the LMRA. The Yakima County Superior Court granted Snyder's Motion for Summary Judgment, finding that federal labor law preempted the Respondents' state court action.

The Washington Court of Appeals reversed. In a four-page opinion reported at 976 P.2d 134 (1999), the court gave cursory consideration to Snyder's arguments. The Court of Appeals found first that the WMWA grants employees non-negotiable substantive rights. However, without analyzing whether those rights were implicated, the Court of Appeals concluded that the Respondents could assert their claims without reference to the relevant CBAs and that therefore, preemption was inappropriate. The Court of Appeals' decision appeared motivated by a concern that if it concluded Respondents' claims were preempted, they "would be forced to arbitrate in violation of public policy since these union employees would be deprived of rights afforded to their non-union counterparts."

Absent from the Court of Appeals' decision, however, was any discussion of the history of the collective bargaining agreement provisions involved. Also missing was any consideration of the extent to which an interpretation of those provisions is necessary to determine whether individuals employed in the position of driver-salesperson fall within the "outside salesperson" exemption to the WMWA. Also absent from the decision was any discussion of the extent to which the Respondents' claims involve allegations that their actual job duties conflicted with the job duties guaranteed to driver-salespersons in the CBAs, and the implications of Section 301 of the LMRA on such a claim. Finally, the court did not address the fact that union employees in exempt jobs are no more entitled to overtime under the WMWA than are their non-union counterparts, and that the only right at issue is the procedural, not substantive, right to bring suit in state court, as compared to the right to pursue the claim through an arbitral forum.

Snyder's timely filed a petition for review, which the Washington Supreme Court denied.

The *Amici* respectfully submit that the State court erred by failing to abide by the LMRA preemption principles recognized by this Court in a series of cases. The Washington State court failed to consider and recognize that the claims at issue are "inextricably intertwined" with the CBA, and that document – as well as the relevant bargaining history – is a necessary component for any resolution of the Respondents' claims.

It appears the Washington Court of Appeals erred in its analysis of the Respondents' claims, and that the decision will have a significant impact on a range of industries in the State of Washington, and possibly reverberate on employers, unions and employees in other jurisdictions as well. Indeed, the impact of the Washington State ruling extends well beyond the baking industry and driver-salespersons to the entire range of wage-hour exemptions that apply across industry, and that may be central to critical aspects of labor contract negotiations and union-management relations. Thus, a definitive and correct resolution of this preemption dispute is important to all parties to collective bargaining agreements.

This Court's decision on the Petition will have serious consequences – both in terms of financial and operational structure – because the ability to rely on negotiated job duties and their relation to exemption determinations will be drastically undermined if the Petition is denied. Accordingly, the *Amici* urge this Court to grant the Petition for a Writ of Certiorari, and reverse the decision below.

ARGUMENT

A. The Washington Court Of Appeals' Analysis of Whether Respondents' Claims Are Preempted By The LMRA Conflicts With Decisions of This Court.

1. Early Interpretations Of Section 301 Of The LMRA By This Court Established That State Law Claims May Be Preempted.

Section 301 of the LMRA provides that federal courts have jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce..." *See* 29 U.S.C. § 185(a) (1998).

In 1957, this Court held that Section 301 not only confers on the federal courts jurisdiction over controversies involving labor contracts, but also authorizes federal courts to craft a body of federal law for enforcement of collective bargaining agreements. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957). According to this Court, Section 301 "expresses a federal policy that federal courts should enforce these agreements... and that industrial peace can be best obtained only in that way." *Id.* at 455. This Court acknowledged that state law compatible with the purpose of Section 301 may be applied, however, it "will not be an independent source of private rights." *Id.* at 457.

This Court first analyzed the preemptive effect of Section 301 in 1962. In *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), this Court held that in litigation within the purview of Section 301 "incompatible doctrines of local law must give way to principles of federal labor law." *Id.* at 102. This Court went on to hold that the Washington Supreme Court was incorrect to apply state contract law to a suit regarding enforcement of a collective

bargaining agreement. *Id.* at 103. Notably, the Court declared that

> State law which frustrates the effort of Congress to stimulate the smooth functioning of that process [of free and voluntary collective bargaining] thus strikes at the very core of federal labor policy.

Id. at 104.

In *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), this Court held that Section 301 preempted a former employee's state law claim for severance pay. The employee had been covered by a collective bargaining agreement, but had failed to use its grievance and arbitration procedures provided therein. Significantly, the Court noted

> [P]ermit[ting] an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it...[a] rule creating such a situation would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.

Id. at 653 (*quoting Lucas Flour*, 369 U.S. at 103).

2. Recent Analyses Of Section 301 Preemption By This Court Establish That State Claims That Are "Inextricably Intertwined" With Labor Contract Terms Or Require Their Interpretation Are Preempted.

In 1985, this Court clarified the scope of the LMRA's preemption provision. In *Allis-Chalmers Corp. v. Lueck*,

471 U.S. 202 (1985), this Court set forth the appropriate standard of review, stating:

> Our analysis must focus . . . on whether the [state law] action . . . as applied here confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the [state law] claim is inextricably intertwined with consideration of the terms of the labor contract.

Id. at 213. This Court went on to hold that Lueck's tort claim against his employer was preempted by Section 301. Significantly, this Court noted that allowing the lawsuit to go forward in state court would allow

> Claims involving vacation or *overtime pay*, work assignment, unfair discharge – in short, the whole range of disputes traditionally resolved through arbitration – [to] be brought in state court... [and] sidestep available grievance procedures...

Id. at 219 (emphasis added).

Two years later, in *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851 (1987), this Court held that Section 301 preempted an employee's state law tort claim that she had suffered injuries because her union had breached its duty to provide her with a safe workplace. *Id.* at 862. According to this Court, preemption was necessary because a court deciding the employee's claim

> would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure

> that Hechler was provided a safe workplace, and, second, the nature and scope of that duty... Thus, as in *Allis-Chalmers*, it is clear that questions of contract interpretation... underlie any finding of tort liability.

Id. Noting the continuing need for federal uniformity in the interpretation of contract terms, this Court stated that the employee could not avoid preemption by characterizing her claim as a state law tort action. *Id.*

A few weeks later, this Court held that state law claims for breach of individual employment contracts were not preempted by Section 301. *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). Though the employees were covered by a collective bargaining agreement, their claims were based on their individual contracts and neither relied upon the collective bargaining agreement nor addressed the relationship between the individual and collective agreements. *Id.* at 395. In an attempt to elucidate the scope of Section 301's preemptive effect, this Court stated

> Claims bearing no relationship to a collective-bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not pre-empted by Section 301.

Id. at 396 n.10.

The following year, in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), this Court – reacting to an inappropriate interpretation of the "inextricably intertwined" standard by the Illinois Supreme Court – expanded on *Allis-Chalmers*, concluding that

> [A]n application of state law is preempted by [Section] 301 of the Labor Management

> Relations Act of 1947 only if such application requires the interpretation of a collective bargaining agreement.

Id. at 412. In a comment that anticipated this suit, this Court noted that

> [A] State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective bargaining agreement for its application. Such a remedy would be preempted by [Section] 301.

Id. at 407, n.7.

In 1990, this Court ruled that Section 301 preempted a state law wrongful death action brought by survivors of miners who had died in an underground fire. *United Steelworkers v. Rawson*, 495 U.S. 362 (1990). The basis for the action was an allegation that the union had been negligent in its performance of safety inspections. However, because the union participated in the inspections pursuant to the collective bargaining agreement, federal law governed the resolution of "questions relating to what the parties to a labor agreement agreed." *Id.* at 371 (*quoting Allis-Chalmers*, 471 U.S. at 211).

In *Livadas v. Bradshaw*, 512 U.S. 107 (1994), this Court held that a former employee's claim to enforce her right to be paid immediately upon discharge under California law was not preempted by Section 301. Specifically, the employer had not paid the employee until three days after her discharge and the employee sought to recover the penalty provided in the statute. Noting that the determination of whether any penalty was due would require reference to a calendar and not to the collective bargaining agreement, this Court determined that preemption was not appropriate. *Id.* at 125. Significantly, this Court stated that "[t]here was no

suggestion here that [the] union sought or purported to bargain away her protections under [that California statute]." *Id.*

Reviewing this body of case law, it is clear that if a plaintiff's claim in an action ostensibly premised on state law requires interpretation of a labor contract as to key terms, definitions and concepts relevant to the claim, it is preempted by Section 301. While certain rights arising under wage and hour statutes may not be waived by labor organizations, it also is clear that such asserted remedies may require interpretation of a collective bargaining agreement. That is true in the case at bar, and the Petition should be granted to consider – and to reverse – the extremely narrow reading the State appellate panel gave to this Court's directives in this important area.

3. The Washington Court of Appeals' Applied A Standard For Determining Section 301 Preemption Which Is Inconsistent With This Court's Decisions.

In the past four years, the Washington Court of Appeals has decided four cases involving Section 301 preemption and the application of the WMWA to unionized driver-salespersons. In each of the four cases, the court found that Section 301 did not preempt the plaintiffs' claims under the WMWA. *See Schneider*, 976 P. 2d 134 (1999); *United Food and Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 925 P.2d 212 (1996); *Ervin v. Columbia Distributing, Inc.*, 930 P.2d 947 (1997); *Huntley v. Frito-Lay, Inc.*, 979 P.2d 488 (1999).

In two of those cases, the Washington Court of Appeals (Division I) applied the following two-part standard:

> [F]ederal labor law does not preempt claims that are based on state laws when those laws

> grant employees nonnegotiable, substantive rights *and* when adjudication of those rights does not depend upon a collective bargaining agreement.

See United Food, 925 P.2d at 214 (*citing Livadas,* 512 U.S. 107 (1994); *Lingle*, 486 U.S. 399 (1988); *Allis-Chalmers*, 471 U.S. 202 (1985)); *Huntley*, 979 P.2d at 490.

However, in *Ervin* and in the instant case, the Washington Court of Appeals (Division III) examined only the first half of this test. The evident confusion within the Washington Court of Appeals as to the appropriate test for determining Section 301 preemption illustrates the need for definitive guidance from this Court.

In these cases, the court found dispositive the fact that the Respondents could assert their claims without relying on a specific term of the collective bargaining agreement. *See Ervin*, 930 P.2d at 951; *Schneider*, 976 P.2d at 136. By focusing solely on the question of whether the Respondents could assert their claims without relying on a specific term in the collective bargaining agreement, the court ignored the second – and in this case, crucial – line of inquiry: Is the Respondents' WMWA claim inextricably intertwined with consideration of the terms of the collective bargaining agreement? For if so, regardless of whether the claim could be asserted without the collective bargaining agreement, the claim is preempted. *See Allis-Chalmers*, 471 U.S. at 213.

Finally, in both *Ervin* and this case, the court found that, because a fact issue existed as to whether the driver-salespersons were "outside salespeople" under the WMWA, summary judgment on the question of Section 301 preemption was inappropriate. *See Ervin*, 930 P.2d at 953-54; *Schneider*, 976 P.2d at 138. This holding demonstrates that the court has misconstrued the preemption analysis,

because it is clear that this issue can be determined only by reference to the CBAs at issue. The Respondents' job duties, which are the determining factor in whether they qualify as exempt under the WMWA, are assigned according to the agreements negotiated by the Teamsters and Snyder's. Evaluating the specifics of those duties cannot be accomplished without interpreting the CBAs at issue. The two issues, indeed, are inextricably intertwined, and therefore, preemption is unavoidable.

B. The Washington Court Of Appeals Erred In Concluding That The Respondents Seek To Vindicate Non-Negotiable Rights Under The WMWA.

The Washington Court of Appeals' decision presumed, without analysis, that the Respondents' WMWA claim implicated non-negotiable rights guaranteed them by Washington law, and for that reason, preemption was inappropriate. Specifically, the court indicated that it believed that deferring to the arbitral process would deprive the Respondents of substantive rights to which their non-union counterparts are entitled under the WMWA. This conclusion is flawed. No individual has the right to a non-exempt position under the WMWA. Therefore, the Respondents' claim does not implicate a non-negotiable substantive right guaranteed to all Washington employees.

The Respondents are, in effect, challenging the provisions of the CBAs that define their job duties so as to render them exempt under the WMWA. The WMWA guarantees overtime pay to non-exempt employees, but does not and can not guarantee them non-exempt positions. Industry and labor *are* empowered to negotiate labor agreements in which employees' job duties will qualify as either exempt or nonexempt under the relevant wage and

hour laws. Snyder's arguments in support of preemption, therefore, do not suggest that it could agree, with the Teamsters, not to pay overtime to non-exempt employees in spite of the WMWA. To the contrary, preemption is appropriate because Respondents' claims directly challenge the decision of the parties to the CBA to structure their job duties as exempt.

The Respondents' challenge also effectively undermines the status of the certified collective bargaining agent as the "exclusive representative" of bargaining unit employees regarding wages, hours and other terms and conditions of employment. As this Court has noted, Section 9 of the National Labor Relations Act, 29 U.S.C. § 159, mandates that unit employees not bypass their collective bargaining agents in situations in which the "probability of strife and deadlock is high." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975).

These are exactly the types of claims that Section 301 of the LMRA is intended to preempt: an effort by individual employees to circumvent the provisions of their collective bargaining agreement by claiming that a provision of state law negates the rights allocated in the collective bargaining process. *See Lucas Flour,* 369 U.S. at 103-04. A fundamental aspect of national labor policy is the commitment of certain issues and rights to the exclusive realm of Federal law, and to the arbitral process where called for by the collective bargaining agreement. *See Allis-Chalmers*, 471 U.S. at 213. The court's conclusion that preemption would violate public policy, therefore, is at odds with the strong national policy of encouraging parties to labor contracts to resolve their disputes through the grievance process. The court's conclusion that preemption would violate public policy was error.

This case does not present facts that justify any such conclusion. Here, to an extraordinary degree, the union contracts and the collective bargaining history reflected in the record play an obvious critical role in defining what the job is, and how it is performed appropriately. Reference to the CBAs and the bargaining history is required, without question, to determine the reasonably objective requirements of the job. Those sources are "inextricably intertwined" with the driver-salespersons' state law claim, and any resolution of their claim to overtime compensation clearly will be "substantially dependent" on an analysis of the CBAs and their evolution.

To suggest otherwise, as the Washington Court of Appeals did, is to advance the view that any and all statutory claims that might form the independent basis for a complaint inevitably survive Section 301 preemption analysis. This analysis apparently would apply regardless of the import or relation of the contract terms to the basic concepts inherent in the state law claim. In the view of the *Amici*, this perspective reflects a distorted reading of this Court's prior holdings regarding the scope of Section 301 preemption.

As noted above, the State court ruling – if allowed to stand – threatens to have a broad disruptive effect in many sectors, within the State of Washington and in other jurisdictions as well. There is a substantial likelihood that a large volume of labor contract negotiations that involve positions to which other overtime exemptions apply also will be destabilized. The roadmap to challenge well-established contractual compensation schemes (outside the grievance and arbitration machinery of otherwise applicable labor agreements) will be clear. Well-established bargaining histories will be ignored, and harmonious labor relations – created pursuant to the overall scheme of Federal regulation – will be disturbed.

CONCLUSION

For the above-stated reasons, the ABA, NAM and SFA respectfully urge this Court to grant review of this matter. This action is necessary to determine whether the Washington Court of Appeals erred in concluding that the Respondents' claims were not inextricably intertwined with an interpretation of the relevant CBAs. It also is warranted to examine whether the court erred, as a threshold matter, in assuming that Respondents' claims solely implicate non-negotiable substantive rights guaranteed in the WMWA.

This Court's granting of the Petition and its full consideration of the decision of the Washington State court is necessary to resolve compelling questions that threaten to have an immediate and dramatic impact on modes of compensation, and methods of distribution, for numerous products, in the State of Washington, and elsewhere.

Respectfully submitted,

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March 1, 2000

Supreme Court, U.S.
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No. 99-1292

In The

Supreme Court of the United States

UNITED STATES BAKERY, INC., dba SNYDER'S BAKERY, INC., a foreign corporation,

Petitioner,

v.

JOHN SCHNEIDER, et al., individually and on behalf of the Class,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals Of The State Of Washington

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28pp

QUESTIONS PRESENTED

This case is not "a challenge to the collective bargaining agreements" covering the plaintiffs' employment. (Petition, 5) It is a garden variety wage and hour case in which the defendant has raised the agreements as part of its affirmative defense. Plaintiffs believe that the issues are properly framed as follows:

1. Whether state law wage and hour claims brought by union-represented driver salesmen are pre-empted by the Labor Management Relations Act when their employer asserts that the workers are exempt "outside salesmen" and a state administrative regulation allows consideration of the "purpose" of their employment in weighing the exemption?

2. Must workers covered by a collective bargaining agreement containing a grievance and arbitration procedure attempt to exhaust that procedure prior to filing a state law wage and hour claim in state court where the agreement does not provide for overtime, and limits the arbitrator's jurisdiction to the four corners of the agreement?

LIST OF PARTIES

Petitioner:

United States Bakery, Inc., d/b/a Snyder's Bakery, Inc.

Respondents:

John Schneider
Kevin Crawford
Roy R. Clark
Mike Edgar
Lee Hendrickson
Mark C. Jordan
Ron Lamp
Terry Moore
Keith Nonemacher
Cal Paulus
Tom Stone
Joe Wurtz
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OPINIONS BELOW

The Washington State Court of Appeals' decision is reported at 95 Wash. App. 399, 976 P.2d 134 and is reprinted in the Appendix, beginning at page B-1. The opinion of the Superior Court of the State of Washington for Yakima County is not reported and is reprinted in the Appendix, beginning at page A-1.

JURISDICTION

The Court of Appeals reversed the Superior Court's dismissal of plaintiffs' complaint, and remanded the case for further proceedings. Absent settlement, the case will be tried on the merits of plaintiffs' state-law wage and hour claims. Defendant maintains that plaintiffs are exempt "outside salesmen" under state law. If defendant prevails on this fact-bound defense, then plaintiffs' wage and hour claim will fail, for exemption is a complete defense to plaintiffs' lawsuit. If defendant loses at trial, it may again seek review here once the state-court litigation is concluded.

Under *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), the decision of the Court of Appeals is accordingly not a "final judgment" for purposes of 28 U.S.C. § 1257(a).

STATUTES INVOLVED

29 U.S.C. § 185(a):

> Suits for violation of contracts between an employer and a labor organization representing

> employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

WASH. REV. CODE ANN. § 49.46.110:

> Nothing in this chapter shall be deemed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing in order to establish wages or other conditions of work in excess of the applicable minimum under the provisions of this chapter.

WASH. REV. CODE ANN. 49.46.120

> This chapter establishes a minimum standard for wages and working conditions of all employees in this state, unless exempted here from, and is in addition to and supplementary to any other federal, state, or local law or ordinance, or any rule or regulation issued thereunder. Any standards relating to wages, hours, or other working conditions established by any applicable federal, state, or local law or ordinance, or any rule or regulation issued thereunder, which are more favorable to employees than the minimum standards applicable under this chapter, or any rule or regulation issued hereunder, shall not be affected by this chapter and such other laws, or rules or regulations, shall be in full force and effect and may be enforced as provided by law.

STATEMENT OF THE CASE

Petitioner seeks review of an intermediate state appellate court's decision reversing the dismissal of plaintiffs' state law wage and hour claim, and remanding the case for further proceedings.

Plaintiffs deliver bread to retail sales outlets in eastern Washington. Defendant pays them no overtime wages regardless of the number of hours they work in a work week.

Plaintiffs are represented for collective bargaining purposes by separate local unions affiliated with the International Brotherhood of Teamsters, one based in Yakima and the other in Spokane, Washington. Neither collective bargaining agreement provides for the payment of overtime for work in excess of forty (40) hours in a work week. Both agreements are in fact silent as to overtime. Under the Yakima agreement, the union and defendant agreed that the plaintiffs "are exempt outside Driver-Sales employees." No similar language appears in the Spokane agreement.

Plaintiffs sued in Yakima County Superior Court seeking payment for their overtime wages under the state Minimum Wage Act, WASH. REV. CODE ANN. § 49.46 *et seq.* Plaintiffs sought certification as representatives of a class consisting of all bread delivery drivers employed by the defendant in Washington. Plaintiffs also sought injunctive relief under the Minimum Wage Act.

The trial court dismissed the complaint, holding plaintiffs' claims preempted by § 301 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 185.

(App. A-1) Defendant did not seek arbitration of the plaintiffs' claims under the collective bargaining agreements, nor did the trial court order it. (*Id.*)

The Washington State Court of Appeals, Division III, reversed, and remanded the case for further proceedings. *Schneider v. Snyder's Foods, Inc.*, 95 Wash. App. 399, 976 P.2d 134, *review denied*, 139 Wash. 2d 1003, ___ P.2d ___ (1999).

REASONS FOR DENYING THE WRIT

A. No Authority Supports the Argument that a Collective Bargaining Agreement Pre-empts State Wage and Hour Laws

There is no authority for defendant's argument that a collective bargaining agreement designating the plaintiffs as exempt from wage and hour statutes preempts state court jurisdiction under those statutes. The decision below is a plainly correct application of settled law reflected in numerous decisions of this Court.

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, does not allow employers and unions to exempt themselves from state regulations with which they disagree:

> Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it

> would be inconsistent with Congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985). Despite the preference for resolving labor disputes through arbitration, § 301 has been held not to pre-empt employee claims under the Fair Labor Standards Act, the federal counterpart to Washington's Minimum Wage Act. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981).[1] Rather, "different considerations apply" when an employee's claim "is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."[2] *Id.*, 450 U.S. at 737.

Defendant argues that a state administrative regulation allowing consideration of the "purpose" of plaintiffs'

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[1] Defendant's suggestion that *Barrentine* supports the principle that a union-represented plaintiff may be required to exhaust arbitration before filing a wage and hour lawsuit (Petition, 8, n.5) is clearly wrong. Nothing in *Barrentine* even remotely supports this argument; rather, the Court refused to give preclusive effect to an unappealed arbitration award in the plaintiff's subsequent FLSA lawsuit. Further, at least in the absence of an express waiver in a collective bargaining agreement, a union-represented plaintiff in an age discrimination case need not arbitrate his claims before filing an Age Discrimination in Employment suit. *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). There is no basis for applying a different rule to plaintiffs' wage and hour claim.

[2] The MWA provides that collective bargaining agreements may establish wages, hours and working conditions only "in excess of the applicable minimum" established by the statute, and allows employees to sue for overtime in Superior Court. WASH. REV. CODE ANN. § 49.46.110, .130.

employment in resolving defendant's "outside salesmen" defense requires pre-emption. This is so, the argument proceeds (without citation to authority), because review of the "purpose" of a job necessarily requires construction of a collective bargaining agreement setting the terms and conditions of the job. (Petition, 9-10).

If defendant is correct, these plaintiffs have recourse to no forum for resolution of their overtime claims. The trial court dismissed their state-law claim outright. (App. A-1) As discussed *in* Section 2, *infra*, plaintiffs cannot invoke arbitration of their statutory claims and, even if they could force arbitration under the collective bargaining agreement, it is by no means clear that the arbitrator would have jurisdiction over their statutory claims. Plaintiffs would not have access to normal discovery, and their claims for enhanced damages and attorney fees would likely not be available. *See, e.g. Atchison T. & S. F. R. Co. v. Buell*, 480 U.S. 557 (1987).

The collective bargaining agreements covering plaintiffs are inadmissable, as discussed in Section 3, *infra*. If the agreements were admissible, and if it were necessary to interpret them, the Washington State Supreme Court has adopted a rule which accommodates the state's interest in enforcement of its wage and hour laws while protecting the federal interest in uniform interpretation of collective bargaining agreements. In *Commodore v. University Mechanical Contractors, Inc.*, 120 Wash. 2d 120, 839 P.2d 314 (1992) the Court held that employer defenses to state-law claims which implicated a collective bargaining agreement did not require dismissal of the complaint. Rather, the Court may adjudicate the defense under its concurrent § 301 jurisdiction. *See Charles Dowd Box Co. v.*

Courtney, 368 U.S. 502 (1962). The *Commodore* Court recognized that the law to be applied to the employer's contract defense was federal law. *Commodore*, 120 Wash. 2d at 131-32.

The state Supreme Court's approach is a sensible accommodation of both federal and state interests in such matters. The defendant's proposed solution – outright dismissal of union-represented employees' wage and hour claims – is manifestly unreasonable, and fails to weigh the state interest in uniform enforcement of its wage and hour laws.

B. Plaintiffs Are Not Required to Submit Their Statutory Claims to Arbitration Under a Labor Contract; Arbitration Would be Pointless

Defendant did not seek arbitration under the collective bargaining agreement in the trial court, nor did the trial court order it. (App. A-1) Arbitration of the plaintiffs' wage and hour claims would be futile where, as here, the unions controlling access to the process have agreed in writing that the plaintiffs are exempt. *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) precludes defendant's argument that the arbitration clauses in the collective bargaining agreements covering plaintiffs' employment are, in themselves, an effective waiver of plaintiffs' right to resort initially to a state judicial forum for resolution of their wage and hour claims.

Ignoring for the moment that the trial court did not send the dispute to arbitration, it remains that the plaintiffs' unions have exclusive responsibility for processing disputes through the grievance and arbitration process. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728,

742 (1981); *Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967). Yet as defendant here notes, the unions agree with defendant that the plaintiffs are exempt.[3] Thus, even if the defendant and the unions agreed to arbitrate the exemption issue, the hearing would be futile since the unions would acknowledge their agreement that the plaintiffs are exempt.

An arbitrator would lack jurisdiction to consider the statutory exemption under the collective bargaining agreements in any event. Arbitral jurisdiction under the Spokane collective bargaining agreement is limited to "the interpretation and construction of this Agreement." The collective bargaining agreement is silent on the subject of overtime. The arbiter thus is not only powerless to award statutory remedies to the plaintiffs (including liquidated damages, attorney fees and interest, all of which are available under state law) but is forbidden by the terms of the contract from considering the minimum wage act in evaluating the case. *See Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972) (Certiorari dismissed as improvidently granted in FLSA overtime case where collective bargaining agreement limited arbitral jurisdiction to grievances "pertaining to a violation of the agreement.")

Further, the Court has long recognized that labor arbitration is an unsuitable forum for statutory wage and hour claims. *Barrentine*, 450 U.S. at 437. Unions are concerned with collective rights, not necessarily individual ones, and may, without violating the duty of fair representation,

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[3] "The Teamsters spent much time evaluating the nature of [plaintiffs'] duties and their compensation before concluding that they were indeed 'outside salesmen.' " (Petition, 5).

"permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Id.* at 742.

Finally, while a labor arbitrator may be competent to resolve "preliminary factual questions, such as whether the employee 'punched in' when he said he did," there are no uniform standards for entry into that profession guaranteeing his competence to decide the "complex mixed questions of fact and law" involved in resolving a wage and hour claim. *Id.* at 743.

C. The Court of Appeals' Evidentiary Rulings Do Not Merit Certiorari

Defendant notes that the Court of Appeals' decision bars admission into evidence of the agreements covering plaintiffs' employment in support of its various defenses. (Petition, 16-17) This evidentiary ruling is unworthy of review.

The Court of Appeals' decision was correct in any event. This Court has long held that neither collective bargaining agreements nor " 'immemorial' custom" can undermine the FLSA. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602-603 (1944). Defendant acknowledges that the protections of the Washington Minimum Wage Act "cannot be bargained away." (Petition, 8) Given the Court's recognition in *Barrentine* that labor unions are not structured so as to champion individual rights under the FLSA, a collective bargaining agreement would seem an ureliable indicator of the "purpose" of a worker's job.

For the first time in this proceeding, Defendant raises the claim that the Court of Appeals' decision barring consideration of the collective bargaining agreements is itself pre-empted. A non-union bakery, the reasoning goes, would be free to submit its "employment agreements" into evidence in defense of a Minimum Wage Act claim by its employees. Barring admission of the collective bargaining agreements in this case thus "cripple[s]" the defendant because it "has the misfortune to be unionized." Defendant argues that this result is pre-empted by § 301 under *Livadas v. Bradshaw*, 512 U.S. 107 (1994).

This is a disingenuous construction of the opinion below. The Court of Appeals did not limit its decision to union-negotiated employment agreements. Any collective or individual employment agreement abrogating a Washington citizen's nonnegotiable rights under the Minimum Wage Act is, under the Court of Appeals' decision, irrelevant in an overtime lawsuit. An individual contract would be even less relevant than a collectively bargained one, given the disparity in bargaining power between an individual worker and his employer. *See, e.g. D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946) (individual releases given in exchange for payment of FLSA-required wages do not bar later suit for liquidated damages allowed under the Act).

CONCLUSION

The Petition should be denied.

March 1, 2000

Respectfully submitted,

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APPENDIX A

THE HONORABLE MICHAEL W. LEAVITT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDON, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ, and ROBERT J. FILLION, individually and on behalf of the Class, Plaintiffs, v. SNYDER'S FOODS, INC., a Washington corporation, and UNITED STATES BAKERY, INC. dba SNYDER'S BAKERY, INC., a foreign corporation, Defendants.	Civil No. No. 96-2-02446-4 **ORDER AND JUDGMENT OF DISMISSAL**

This Court heard Defendant United States Bakery's Motion for Summary Judgment on January 9, 1998. The Court had reviewed all the brief and affidavits submitted by the parties, and heard argument of counsel. The Court finds that this case is preempted by the Sec. 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Now therefore,

IT IS HEREBY ORDERED that Defendant United States Bakery's Motion for Summary Judgment is GRANTED, and this case is DISMISSED with prejudice.

DATED this ___ day of ___, 1998.

/s/ _____ Michael W. Leavitt
Superior Court Judge

Presented by:

TONKON TORP LLP

By /s/ _____
Peter H. Koehler, Jr., WSB No. 12708
Of Attorneys for Defendants

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APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLION, individually and on behalf of the Class, Appellants, v. SNYDER'S FOODS, INC., a Washington Corporation, Defendant. UNITED STATES BAKERY, INC. d/b/a SNYDER'S BAKERY, INC., a foreign corporation, Respondent.	No. 17312-7-III Division III Panel One PUBLISHED OPINION* FILED MARCH 30, 1999

KATO, J. – Route drivers for Snyder's Bakery, Inc., appeal the summary judgment dismissal of their overtime wage claims. We reverse.

John Schneider and 12 other employees of United States Bakery d/b/a Snyder's Bakery, Inc., (Snyder's) filed a class action lawsuit against their employer for unpaid overtime compensation. All the employees are

route drivers who receive a commission on their individual sales plus a fixed salary. They are members of the Teamsters Union, which has a collective bargaining agreement with Snyder's that classifies route drivers as exempt salesmen. The complaint alleges that despite their working in excess of 40 hours a week, they have not received overtime as required by RCW 49.46.

Snyder's asserted these affirmative defenses: (1) failure to state a claim upon which relief can be granted, (2) statute of limitations, (3) preemption by the Labor Management Relations Act of 1947 (LMRA), and (4) failure to exhaust administrative remedies. Claiming the LMRA preempted the overtime claims, Snyder's moved for summary judgment. The court agreed and granted summary judgment dismissal. This appeal followed.

We review an order of summary judgment by engaging in the same inquiry as the trial court. *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 123, 839 P.2d 314 (1992). An order of summary judgment is appropriate when there is no genuine issue of material fact. CR 56(c); *Ervin v. Columbia Distrib., Inc.*, 84 Wn. App. 882, 886, 930 P.2d 947 (1997). The court must consider the facts in the light most favorable to the nonmoving party. Id. Summary judgment is appropriate only if, after considering all the evidence, reasonable persons could reach but one conclusion. *Commodore*, 120 Wn.2d at 123.

The route drivers contend they were entitled to overtime compensation pursuant to RCW 49.46, the Minimum Wage Act (MWA). Snyder's argues these claims were properly dismissed because they are preempted by the LMRA. Although federal law does not generally preempt

the MWA, section 301 of the LMRA, 29 U.S.C.A. SS 185 (West Supp. 1978), authorizes federal courts to resolve disputes involving collective bargaining agreements. Ervin, 84 Wn. App. at 888-89. Section 301 preempts the application of state law to interpret or enforce these bargaining agreements. *Commodore*, 120 Wn.2d at 126. Only those claims which are founded directly on rights created by a collective bargaining agreement and those substantially dependent upon construction of the agreement are governed by section 301. *United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 51, 925 P.2d 212 (1996), *review denied*, 133 Wn.2d 1021 (1997). Federal law does not preempt claims based upon state law when the law grants employees nonnegotiable substantive rights and when adjudication of those rights does not depend on the collective bargaining agreement. Id.

Rights established by state law are nonnegotiable when they cannot be waived, alienated, or altered by private agreement. Id. at 51. The MWA establishes a minimum standard for wages and working conditions for all employees. Id. (citing RCW 49.46.120). Under the MWA, employees have the right to overtime when they work more than 40 hours a week. RCW 49.46.130. In enacting these protections, the Legislature has stated that collective bargaining agreements may establish wages or other work conditions only in excess of the statutory minimums. RCW 49.46.110; *United Food & Commercial Workers*, 84 Wn. App. at 52. Accordingly, the rights provided by the MWA may not be waived by a collective bargaining agreement. *Ervin*, 84 Wn. App. at 891.

When a state law claim is independent or does not require interpretation of the collective bargaining agreement, section 301 does not preempt the claim. A state claim is independent of a collective bargaining agreement if it can be asserted without reliance on an employment contract. *Commodore,* 120 Wn.2d at 130-31; *Ervin,* 84 Wn. App. at 889.

This court in *Ervin* determined that claims under the MWA are not preempted by section 301. *Ervin,* 84 Wn. App. at 888. Mr. Ervin sought unpaid overtime from his employer. At the beginning of his employment, he was advised that his employer would not pay overtime wages. The union contract guaranteed him 40 hours' pay each week. Mr. Ervin did not work fewer than 8 hours in a day and began keeping track of the number of hours he worked. The collective bargaining agreement provided for time-and-a-half pay for hours worked in excess of 10 in a day or 40 in a week. Mr. Ervin quit his job and filed suit seeking overtime compensation.

On the employer's motion for summary judgment, the trial court dismissed the complaint. Id. at 886. On appeal, this court determined Mr. Ervin's claim was not preempted by section 301 because he could assert his claims without relying on the collective bargaining agreement. Id. at 890. The court stated that the rights provided by the MWA could not be waived or altered by a collective bargaining agreement and employees were not required to arbitrate these "nonnegotiable" claims. Id. at 891.

The general preference for arbitration was outweighed by the statutory requirements of the MWA and

the strong public policy against depriving union employees of statutory rights that would be available to nonunion employees. Id.

Here, like *Ervin*, the route drivers brought an action for unpaid overtime under the MWA. They can assert this claim without relying on the collective bargaining agreement. If the claims were preempted, they would be forced to arbitrate in violation of public policy since these union employees would be deprived of rights afforded to their nonunion counterparts. The court erred by granting summary judgment dismissal based on preemption.

Snyder's argues summary judgment was nonetheless appropriate because the court must interpret the collective bargaining agreement in order to determine if the route drivers are entitled to overtime. RCW 49.46.130 provides that, except for persons exempted under RCW 49.46.010(5) as outside salesmen, any employee who works more than 40 hours a week is entitled to overtime. Snyder's claims the route drivers are outside salesmen pursuant to RCW 49.46.010(5)(c) and are thus exempted from overtime. The statute defers to the rules of the director of labor and industries to define and delimit the term "outside salesman."

WAC 296-128-540 defines an outside salesman as any employee:

(1) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business, as well as on the premises (where the employee regulates his own hours and the employer has no control over the total number of hours worked) in the following alternative activities:

(a) In making sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or

(b) In obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; or

(c) In demonstrating products or equipment for sale; or

(d) In the sale of services and performance of the service sold when the compensation to the employee is computed on a commission basis; and

(2) Whose hours of work of a nature other than that described in (1)(a), (b), (c) and (d) of this section do not exceed 20 percent of the hours worked in the work week by nonexempt employees of the employer: Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work; and

(3) Who is compensated by the employer on a guaranteed salary, commission or fee basis and who is advised of his status as "outside salesman."

If the route drivers meet the definition of outside salesmen, they would not be entitled to overtime compensation. Snyder's claims the court cannot determine if they fall under this definition without interpreting the collective bargaining agreement. But the court need not interpret the collective bargaining agreement to make that determination. The court need only consider evidence as to their job duties. In any event, determining whether the

route drivers are indeed outside salesmen involves genuine issues of fact which cannot be resolved by summary judgment. *See Ervin*, 84 Wn. App. at 894-95.

Reversed.

SWEENEY and BROWN, JJ., concur.
Reconsideration denied May 4, 1999.

Supreme Court, U.S.
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No. 99-1292

In The

Supreme Court of the United States

October Term, 1999

UNITED STATES BAKERY, INC., dba SNYDER'S BAKERY, INC., a foreign corporation,

Petitioner,

v.

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLIUM, individually and on behalf of the Class,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Washington (Division III)

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Filed March 13, 2000

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1. THIS COURT DOES HAVE JURISDICTION UNDER THE FINAL JUDGMENT RULE.

Respondents challenge our assertion that this Court has jurisdiction under the final judgment rule. Yet they ignore this Court's decision in *Belknap* that a state court judgment like this one *is* final for purposes of certiorari. *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n 5 (1983). They rely instead on another decision that is much further afield. *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997).

The question in *Belknap* was the same as in our case: whether federal labor law pre-empted a state court lawsuit by employees against their employer. This Court's explanation in *Belknap* why it had jurisdiction applies here equally: "To permit the proceedings to go forward in the state court" would involve "a serious risk of eroding the federal [pre-emption] policy." The pre-emption issue should therefore "be decided by this Court ... sooner rather than later in the course of the litigation." *Id.*, 463 U.S. at 497 n 5.

2. THIS DISPUTE REQUIRES THE ATTENTION OF THIS COURT.

Respondents' brief inadvertently makes our point. They acknowledge that their own collective bargaining agent decided they were "outside salesmen," and so agreed on their behalf. (Respondents' brief at 8.) They declare that arbitration would be futile because their own union disagrees with them. (*Id.*)

In other words, respondents admit they are using a state court lawsuit to attack a provision of their collective bargaining agreement. That would not present such a problem if the collective bargaining provision purported to

waive their nonnegotiable rights under a state statute. That isn't the case here. This state statute did not grant them an unequivocal right to overtime pay. Indeed, the state statute *denies* them such a right if the "purpose" of their employment is outside sales.[1] Now the "purpose" of a job is something that is at the heart and core of collective bargaining, whether that purpose be making sales, operating a lathe, or conducting a locomotive. Respondents' union therefore was acting within the scope of its authority when it bargained on their behalf that the "purpose" of their employment was indeed outside sales. Respondents disagree with their bargaining agent about that---and with the majority of their fellow workers. They turn to state court to invalidate that provision of their own collective bargaining agreement.

This case therefore offers a much-needed opportunity to sort out the respective roles of state law and collective bargaining when they overlap, when both have a valid role to play in resolving a dispute. There are three possible outcomes. The state court agreed with respondents that the collective bargaining agreement must yield to state law. Respondents accuse us of arguing for just the opposite, for the destruction of their state law rights in collective bargaining. We contend, however, that there is a third solution that is superior to these two either-or alternatives. As we suggested in our petition, there is a way for the state interest and the federal interest to be balanced and accommodated. Articulating that balanced solution is a task that only this Court can accomplish.

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[1] There are also other factors which govern whether they have such a right too, such as who has control over their hours. These factors are also subjects of collective bargaining.

We acknowledge that respondents should have a proper forum for their claims. That does not mean, however, that they can bypass the arbitration to which they agreed. Their complaint is essentially that they aren't performing outside sales in accordance with their job description. If that is so, then grievance arbitration can afford a way to change their jobs or their duties, without necessarily upsetting the jobs and duties of their hundreds of fellow driver-salesmen who they claim to represent. Afterwards, there may or may not be anything left of their state law claims. If there is, then any subsequent adjudication in state court may take account of previous decisions of the arbitrator within the scope of the arbitrator's function.

Respondents complain that the trial court dismissed their claim, rather than ordering arbitration. That, however, is precisely what this Court has done in similar circumstances. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220-21 (1985). It is, after all, up to them to invoke the arbitration procedure. If something remains of their state law claim afterwards, it can be dealt with then.

3. THE DECISION BELOW UNDERMINES THE RIGHTS OF A UNIONIZED EMPLOYER.

To get around the pre-emption doctrine, the Court of Appeals held that the trial court need not consider the collective bargaining agreements. We pointed out that that would deprive a unionized employer if its best evidence, and thereby impose an unfair penalty on the employer who

participates in collective bargaining.[2] Respondents now attempt to justify such an exclusion of evidence.

The Washington Court of Appeals did *not* hold that employment agreements were irrelevant evidence of the "purpose" of the employment. It simply crafted a way to keep these collectively bargained agreements out of evidence in order to avoid federal pre-emption. The general rule in Washington is to the contrary, *i.e.* that written contracts are the best evidence of the purpose of the parties. *Truck Insurance Exchange v. Rohde*, 49 Wash.2d 465, 469, 303 P.2d 659, 661 (1956) ("A basic rule in the construction of contracts is that the intention of the parties must control."); *McDowell v. The Austin Co.*, 39 Wash. App. 443, 693 P.2d 744, 749 (1985) ("The most reliable clue to the parties' intentions in a deliberately prepared and negotiated contract is the language of the contract.") It is pure invention to say that the Washington Court of Appeals invented a rule that applied to non-collectively bargained agreements as well.

Finally, respondents say that the collective bargaining agreements may be received into evidence, but only in support of our affirmative defense. (Respondents' brief at 6-7.) In other words: the federal pre-emption policy doesn't apply as long as the collective bargaining agreements are construed by the trial court at the behest of the defendant, rather than the plaintiff. We agree that Washington decisions so state. That, however, renders the pre-emption policy meaningless, and it is contrary to this

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2 Respondents say that we make this argument for "the first time in this proceeding." We could hardly have taken issue with the Court of Appeals' decision before it was issued. We have raised the arguments we make here at every step that we could.

Court's own precedents. *See, e.g., Livadas v. Bradshaw*, 512 U.S. 107, 124 n 18 (1994).

CONCLUSION

The Court should grant the writ.[3]

Respectfully submitted,

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Filed March 13, 2000

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[3] Petitioner has learned that on February 29, 2000, the Supreme Court of Washington denied a Petition for Review in another case that raises issues under the federal labor laws and the Washington Minimum Wage Act like those presented in the instant case. *Robert Huntley, et al. v. Frito-Lay, Inc.*, No. 68662-9 Petitioner is advised that the petitioner in that matter, Frito-Lay will be submitting promptly a Petition for Writ of Certiorari to this Court.